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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 570

VICTORIA MUTUAL WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent in Opposition

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OPINION BELOW

On June 16, 1965, the Supreme Court of the State of California denied, without opinion, petitioner's Petition for a Writ of Review of Decision No. 68273 of the Public Utilities Commission of the State of California, reported at 63 Cal. P.U.C. 649 and set out at pages 2-30 of the Appendix to the instant petition.

JURISDICTION

The basis of this Court's jurisdiction is set forth in the petition.

QUESTION PRESENTED

Whether petitioner was denied notice and opportunity to appear in the proceedings before the Commission in violation of its rights to due process of law.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional provision involved is:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.[1]

The statutes involved are:

California Public Utilities Code, Sections 451, 454, 1001, 1757, 1760, and 2701.[2]

The Commission submits that, contrary to petitioner's assertion, California Public Utilities Code Section 2705 is not involved for reasons that will hereafter be made clear.

STATEMENT

The proceeding before the Commission involved a dispute between three public utility water companies, Suburban Water Systems, Vallecito Water Company and San Gabriel Water Company over proposed service to residential tracts in Los Angeles County.

After public hearings, the Commission issued its Decision No. 64047 on July 31, 1962, authorizing Surburban and Vallecito to serve the tracts and prescribing the rates to be assessed for such service.

On March 8, 1963, San Gabriel sought rehearing before the Commission alleging that Surburban was circumventing the authority of the Commission and its decision prescribing the reasonable rates by serving portions of the tracts

1. Set forth at page 51 of the Appendix to the petition.
2. Set forth in the Appendix to this brief in opposition.

through an unregulated mutual water company called Sunset Hills Service Company. San Gabriel requested that it be substituted to serve the tracts.

Rehearing was held and the following evidence adduced:

The subdivider was dissatisfied with certain of the conditions of service imposed upon Surburban by the Commission's order. Surburban then entered into an agreement to supply water to Sunset Hills Service Company for redistribution through the tracts.

However, the latter encountered difficulties with the California Corporation Commissioner in attempting to qualify as a mutual water company and transferred its distribution system to petitioner (although legal title had not passed at the time of the rehearing). Petitioner thereafter served the tracts *at rates more than double those authorized for Suburban.*[3]

At the time of the transfer of the system to petitioner Surburban owned over half of the outstanding shares of petitioner. The system itself was constructed by companies substantially owned and controlled by the president and dominant stockholder of Suburban. Petitioner had no employees and its services were performed by one of the Suburban affiliates. The latter, petitioner and Suburban had common officers and directors. Just prior to the rehearing, petitioner elected new officers and directors which included two employees of Suburban and one of an additional Suburban affiliate.[4] Although purporting to operate

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3. A comparison of the rates charged by petitioner and authorized for Suburban is set forth in the Commission's Decision No. 68273 and appears at page 9 of the Appendix to the petition.

4. The complex relationship of Suburban, petitioner, the other affiliates and various officers, directors and employees are set forth in Commission Decision No. 68273 and appears at page 10 of the Appendix to the petition.

as a mutual water company, petitioner does not actually issue shares to residential users or deliver water at cost to shareholders, indicia of a true mutual under California law.

Suburban contemplated that it would acquire petitioner's system, a transfer that Suburban frankly admitted "would be relatively simple inasmuch as Suburban owned the majority of the control of stock in Victoria."[5] The transfer was precipitated by the filing of San Gabriel's petition for rehearing.

Suburban also explained with candor its reasons for using petitioner to serve the tracts. As a regulated entity, Suburban's water rates were subject to Commission regulation. Through the use of petitioner, cost information could be developed which would be presented to the Commission in an application for higher rates after the acquisition of petitioner. Any loss incurred in the interim would be borne by the customers through higher rates assessed by the unregulated petitioner, rather than by Suburban.[6]

Based upon the foregoing undisputed evidence, the Commission included in Decision No. 68273 the following findings:

> "3. From January 1, 1962 to date Suburban has owned a majority of the shares of common stock in an entity known as Victoria Mutual Water Company, and at all times from January 1, 1962, Suburban has had and exercised full control over the affairs and operations of Victoria.
>
> "4. Victoria is, and has been since at least January 1, 1962, the *alter ego of* Suburban.

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5. Reptr.'s Tr., p, 1111.
6. Reptr.'s Tr., pp. 1114-1116

"5. Suburban, operating through its *alter ego* Victoria, caused water distribution systems to be constructed in Tracts Nos. 27171 and 27172, which tracts are located within Areas B and C.

"6. Suburban, operating through its *alter ego* Victoria caused to be charged to customers in Areas B and C rates higher than those which Suburban was authorized to charge in these areas.

"7. The following individuals were among those who participated in some or all of the transactions by which Suburban utilized and operated as aforesaid through Victoria as an *alter ego*: Camille A. Garnier, Roger Ellis, C. H. Deitz, John Harper, James Campbell, Phil A. Carli, Bailey Kerr, and Dwight Holcomb.

"8. Victoria has operated as a public utility water company without proper operating authority from this Commission from at least March 7, 1963 to date, and on or about said date of March 7, 1963 dedicated its property and service to the public use."

The decision also ordered Suburban to cause petitioner to file tariffs and a map of its system.

ARGUMENT

The petition raises no federal question requiring settlement by this Court. The Commission is an agency created by the Constitution of California and given broad powers to regulate the franchising, rates and conditions of service of public utility water companies. (Art. XII, Sec. 23, Calif. Const.) Those powers have been regularly and lawfully applied in this proceeding to petitioner as an instrumentality of Suburban, a regulated public utility, which admittedly owns and dominates petitioner, using it as a vehicle to provide public utility water service in evasion of the Commission's jurisdiction.

1. Petitioner Had Actual Notice of the Proceeding Before the Commission and Opportunity to Appear.

Notice of the hearings upon which the order of the Commission now under attack is based was sent to one Carl H. Dietz who was an officer of both petitioner and Suburban. Subpoenas were issued and served upon Dietz and the other officers and directors of petitioner, all of whom appeared and testified at the hearings.

Further, at the hearing of July 30, 1963, Attorney J. Robert Maddox of the law firm of Gray and Maddox, Beverly Hills, California, appeared and made the following statement:

> "MR. MADDOX: We are here today, Mr. Examiner, on behalf of the Victoria Mutual Water Company. Certain of its officers have been subpoenaed, as will more clearly appear later on, certain contracts, agreements have been entered into in relation to Suburban Water Systems and that mutual water company and as a consequence, I think it is appropriate that we appear on their behalf.
>
> "It may appear a little premature to you at this time, but I would appreciate it if you would accept it on its face value and on my representation that it is proper.
>
> "EXAMINER JARVIS: Well, you then intend to take a position in the proceeding, aside from representing, counseling anybody who may be subpoenaed?
>
> "MR. MADDOX: I think not.
>
> "EXAMINER JARVIS: Well, I will permit you to represent a subpoenaed witness, give him advice and counsel, but under the Commission's rules, if you want to appear in the proceeding, the rules require you to state your interest in the proceeding, et cetera.
>
> "All I am seeking to ascertain at this point is whether you are just going to represent a subpoenaed witness

or whether you are going to take a position in the proceeding?

"MR. MADDOX: It is a difficult question to answer. At this point I would appreciate it if you would simply accept it on its face value at this time."[7]

At the same time, San Gabriel's counsel stated his intention to move that the Commission find petitioner to be the *alter ego* of Suburban and a public utility.

Thus, it is clear that petitioner through its officers and directors had actual notice of the proceedings before the Commission and appeared themselves in person. Further, petitioner itself appeared through counsel, notwithstanding the ambiguousness of such appearance. The officers and counsel had actual notice that the status of petitioner was in issue. Neither the officers nor petitioner's attorney were denied an opportunity to be heard. No postponement was requested. Under such circumstances, petitioner must be deemed to have waived any objection to the lack of notice or opportunity to be heard. (*Brewer v. Railroad Commission,* 190 Cal. 60, 81-82; *Ghriest v. Railroad Commission,* 170 Cal. 63, 64.)

Moreover, petitioner does not specify the character of the notice which it was assertedly denied. In general, a voluntary appearance by a person, or by one's attorney, either by filing a pleading or otherwise recognizing the authority of the court constitutes a waiver of the service of process. (Sec. 416, Calif. Code Civ. Proc.; *Lacey v. Bertone,* 33 Cal.2d 649; *Harrington v. Superior Court,* 194 Cal. 185; *Remillard Brick Co. v. Dandini,* 47 Cal.App.2d 63.)

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7. Reptr.'s Tr., pp. 985-986.

2. The Commission's Determination of Petitioner's Public Utility Status Was an Appropriate and Constitutional Exercise of Its Jurisdiction and in Conformity With the Decisions of This Court and the California Supreme Court.

Petitioner does not appear to challenge the theory of the Commission's jurisdiction over it, but rather the procedural application of that theory. However, both this Court and the California Supreme Court have uniformly and consistently sustained the power of the Commission to apply the *alter ego* doctrine in the exercise of its regulatory jurisdiction and to issue orders affecting a corporate entity, which although not specifically named as a party in the proceeding before the Commission, is actually before the Commission through its affiliated entity for regulatory purposes. (*Alhambra Trucking Co.*, 60 Cal. P.U.C. 544, Writ of Rev. den., Nov. 27, 1963, S.F. No. 21440, Appeal Dismissed, October 19, 1964, 13 L.Ed. 2d, 84; *IPCO Transportation Co.*, 60 Cal. P.U.C. 537, Writ of Rev. den., Oct. 16, 1963, S.F. No. 21334, Appeal Dismissed, October 19, 1964, 13 L.Ed. 2d, 84; *Soule Transportation, Inc.*, 59 Cal. P.U.C. 260, Writ of Rev. den., May 29, 1962, S.F. No. 21024; *Truck Maintenance, Inc.*, 59 Cal. P.U.C. 103, Writ of Rev. den., May 23, 1962, S.F. No. 20993.) Such denials by the California Supreme Court, even though without opinion, are equivalent to a holding that the Commission acted within its constitutional and statutory powers. (*People v. Western Air Lines, Inc.*, 42 Cal.2d 621, 630; *Southern Calif. Edison Co. v. Railroad Com.*, 6 Cal.2d 737, 756.)

Pratt v. Coast Trucking, Inc., 228 Cal.App.2d 139, involved an action by a highway carrier to recover shipping charges. The reviewing court held that an order of the Commission, which found that one of the defendants, Coast Trucking, was the *alter ego* of a second defendant, Baugh Lumber Sales Co., was conclusive in the action to recover shipping charges even though Baugh was not a party to the proceed-

ing before the Commission. Thus, although not a party to the Commission proceeding, Baugh's rights and liabilities were definitely and finally adjudicated.

The *alter ego* doctrine is esentially an equitable one and its applicability is primarily a question of fact. (*H.A.S. Loan Service, Inv. v. McColgan,* 21 Cal.2d 518, 532; *Stark v. Coker,* 20 Cal.2d 839, 846.) Similarly, the determination of public utility status is also a question of fact. (*Western Canal Co. v. Railroad Commission,* 216 Cal. 639.)

The California Supreme Court has sustained the Commission's application of the *alter ego* doctrine in a determnation of the public utility status of a water company dominated by another utility and purporting to be an independent mutual water company in (*Western Canal Co. v. Railroad Commission, supra,* 216 Cal. 639.)

The two requirements for the disregarding of a corporate entity have been stated to be (1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow. (*Riddle v. Leushner,* 51 Cal.2d 574, 580; *Automotriz, etc. De California v. Resnick,* 47 Cal.2d 792, 796.) The evidence before the Commission fully supports the application of the *alter ego* doctrine to petitioner in this proceeding. It is difficult to conceive of a more inequitable situation than Suburban's intentional use of petitioner to charge rates higher than those authorized by law.

In view of the foregoing, petitioner's continued assertion that it is a mutual water company exempt from Commission regulation is without any foundation.[8]

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8. Similarly, petitioner's statement on page 14 that it cannot provide water service or make charges therefor without Commission approval is an erroneous statement of California law. (See Sections 451 and 1001, Calif. Pub. Util. Code.)

3. No Important Federal Question Is Raised by Petitioner.

This proceeding involves the factual application of an equitable doctrine. The procedural application of the *alter ego* doctrine is entirely consistent with prior applications which have been favorably reviewed by this Court and the California Supreme Court. Petitioner had notice and opportunity to appear before the Commission. The Commission reviewed its action upon petition for rehearing. The California Supreme Court further reviewed petitioner's contentions. That review, although limited on issues of fact, is not limited on constitutional questions.[9] (Sec. 1760, Calif. Pub. Util. Code (see page 3 of Appendix).)

Throughout the proceedings before the Commission, Suburban Water Systems has attempted to use the fiction of petitioner's separate corporate existence to evade the responsibilities imposed upon it as a public utility. The present petition is a weak prolongation of the evasion and, clearly, raises no important federal questions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 10, 1965.

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9. Petitioner's statement on page 15, that because of limited judicial review, the Commission has become "lax" in guarding constitutional rights, is erroneous in its premise and unfounded and unsupported in its inference.

(Appendix Follows)

Appendix

Sections of the Public Utilities Code of the State of California

451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

454. No public utility shall raise any rate or so alter any classification, contract, practice, or rule as to result in any increase in any rate except upon a showing before the commission and a finding by the commission that such increase is justified.

The commission may establish such rules as it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support of proposed increases, the form and manner of the presentation of such showing, and the procedure to be followed in the consideration thereof. Rules applicable to common carriers may provide for the publication and filing of any proposed increase together with a written showing in support thereof, giving notice of such filing and showing in support thereof to the public, affording an opportunity for protests thereto, and to the consideration of, and

action on, such showing and any protests filed thereto by the commission, with or without hearing; provided that the proposed increase shall not become effective until it has been approved by the commission.

1001. No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, or water corporation shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction.

This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. If any public utility, in constructing or extending its line, plant, or system, interferes or is about to interfere with the operation of the line, plant, or system of any other public utility or of the water system of a public agency, already constructed, the commission, on complaint of the public utility or public agency claiming to be injuriously affected, may, after hearing, make such order and prescribe such terms and conditions for the location of the lines, plants, or systems affected as to it may seem just and reasonable.

1757. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the

record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

1760. In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the finding or conclusions of the commission material to the determination of the constitutional question shall not be final.

2701. Any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter.